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In the

# Supreme Court of the United States

OCTOBER TERM, 1952

No. [redacted]474

LESLIE D. BLOOM and IDA DUBOSE, Guardians of FLORA ALWARD ROHNERT (T. J. COENEN, Curator for the Absent Heirs of FLORA ALWARD ROHNERT, Deceased),

*Petitioners,*

*v.*

JOHN W. WILLIS, *et al.*, ROY SNIDER, *et al.*, and SUN OIL COMPANY, *et al.*,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

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---

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

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Petitioners pray that a writ of certiorari issue to review the judgments of the Supreme Court of Louisiana, entered in the above entitled cases (three cases by the same plaintiffs against three separate sets of defendants, but involving the same issues and tried on the same evidence, consolidated for purposes of trial and appeal, by order of the trial court, pursuant to joint motion of the plaintiffs and all the defendants) on June 2, 1952, and the order of said

court denying petition for rehearing, entered on July 3, 1952. The time within which to file petition for writ of certiorari was extended by order signed by Honorable Hugo L. Black, Associate Justice, on September 29, 1952, to and including November 30, 1952, copy of which is attached as Exhibit A to this petition.

## OPINIONS BELOW

The opinion and judgment of the Supreme Court of Louisiana (R., Vol. XIII, pp. 112-123) is reported in *60 So. 2d 415.*

## JURISDICTION

Jurisdiction of this Court is invoked under *28 U. S. C. 1257 (3)*, and the Revised Rules of this Court, and particularly Rule 38, par. 5, and Rule 12, par. 1. The Federal question was created and brought into this case for the first time by the decision of the Supreme Court of Louisiana, which was unexpected and could not have been previously anticipated. It was, therefore, raised for the first time in these petitioners' Petition for a Rehearing in said Court, as shown in the last paragraph of Section 5, of Article I of said petition, as follows:

> "Inasmuch as this letter has not been denied by the Appellees, it must be assumed to be true, and regardless of this Court's view on any other phase of this case, the fact remains that the case had admittedly been decided on perjured testimony. Therefore, the action of this Court in overruling the Appellants' motion to remand based on this letter has denied Appellants the right to a trial, thereby depriving them of their rights and

property in violation of the due process clause of the 14th Amendment to the Constitution of the United States."

These suits were instituted in the Fifth Judicial District Court of Richland Parish, Louisiana, being the court having original exclusive jurisdiction, which court, after a trial on the merits, rendered judgment in each case, rejecting petitioners' demands and dismissing their suits.

Proper and timely notice of appeal to the Supreme Court of Louisiana, was given in open court, said court being the only State court having appellate jurisdiction of said cases, and the highest State court in which a decision could be had. That court affirmed the judgments. Within the time provided by the laws of Louisiana, and the Rules of said court, petitioners filed a motion for a rehearing, which was "refused" without comment and without assigning any reasons.

The particular legal proposition on which the rehearing was refused is, therefore, left to conjecture, unless it can be reasonably inferred from the language in the court's opinion affirming the cases.

Petitioners believe and respectfully submit that the decision is predicated on two erroneous conclusions of law, and that is:

1. That, under the Michigan laws, a present agreement to accept each other as husband and wife and from that time on maintain such relation, cannot be implied, but can only be established by written agreement, or by witnesses

who were present and heard each of the parties accept the agreement.

2. That under the Michigan laws, it would not be possible to contract a marriage under the common law if it was also agreed to keep the marriage a secret from anyone.

These propositions will be discussed in the argument.

## QUESTIONS PRESENTED

1. Does the Due Process Clause, Section 1, of the Fourteenth Amendment to the National Constitution guarantee the right of a citizen of the United States to a fair and impartial trial, or the opportunity of a fair and impartial hearing in a civil action instituted to recover possession of, and establish title to, property, consisting of real, mixed and personal property situated in Louisiana, by suit instituted and prosecuted in the manner described.

2. If subsequent to the decision in the trial court, pending the appeal, after the trial court has lost jurisdiction, but prior to a decision in the Supreme Court of Louisiana:

(a) Petitioners discover a vast amount of evidence which was not available when the case was tried, and the circumstances were such that petitioners could not have discovered it through the exercise of due and reasonable diligence, and such evidence, or a large part of it, was not cumulative of evidence adduced at the trial, and would have established petitioners cause of action by the undis-

puted evidence by rendering the evidence of defendants in the record nugatory in that it would no longer be material or relevant to the only issue decided by the trial court, and affirmed by the Supreme Court, but, even if the petitioners are mistaken in this contention, such newly discovered evidence, no part of which has been denied or controverted by the defendants, would at least prove and establish petitioners' case by an overwhelming preponderance of the evidence; that immediately upon the discovery of such evidence, petitioners filed a motion in the Louisiana Supreme Court styled "Motion to Remand" (Record, Vol. XIII, pp. 4 to 57) to which they attached affidavits of 12 persons setting forth the nature and substance of such testimony, and also affidavits of Philip A. McHugh, an Attorney and Assistant Prosecuting Attorney of Wayne County, Michigan, and W. T. Saye, Counsel for petitioners, explaining in detail the circumstances under which the evidence was discovered, and why it had not been possible to obtain the same prior to the trial, and praying that if the appellate court found on the record made in the trial court, petitioners were not entitled to a reversal, the case be remanded to the trial court for the limited purpose of taking such additional evidence, giving the defendants an opportunity to offer any evidence they might have in opposition.

(b) Petitioners concede that the judgment of the State Supreme Court rejecting their Motion to Remand, though erroneous, raised no Federal question, and, standing alone, did not amount to a denial of Due Process, within the meaning and purview of the Fourteenth Amendment, *but*

(c) While this cause was still pending in the State Supreme Court, and before it had been decided, on December 17, 1951, petitioners filed in said Court their "2nd Supplemental Motion to Remand," in which they stated by verified pleading that W. T. Saye, one of petitioners' attorneys of record, had received a letter from one Richard L. Sims, bearing date of August 1, 1951, mailed at Rayville, Louisiana, in an envelope postmarked "Rayville, La., Aug. 1, 12 M 1951." Copy of the letter and the envelope were made exhibits to the motion. The letter is as follows:

> No doubt this letter will be some what like a bolt from the blue. But I have been contemplating writing you or coming over to see you.
>
> As you probably are aware I was the man behind the gun on Nance's project, giving him all the information and leads whereby he made his case.
>
> All that time taken up tracing down certain necessary points as he called them, was unnecessary to my point of view, as I had placed the case in his hands and all he had to do was just pull the drawstring and he had it in the bag. I have never understood why he tried to double cross me, and sometimes I think he was urged by others not known to me.
>
> In just a few short words I was the goat and for both sides.
>
> Hunt (Warren Hunt) came to me and asked me if I had signed any contract with the other side, saying to me: "You know I represent Sun, and some of your friends in Delhi and I think we can get together on a few things."

Well to make it short I went to work for them and at a nominal salary. Not giving any information because all I know was against Willis, et al. But I was paid just to stay away from them.

Any way I got for my troubles my salary and when your case came up and was tried in this court I was paid the *huge* sum of $750.00 and cast adrift.

I have never liked the way in which Willis acquired that place and would like to see him sweat. And I also know people in Detroit that know all about it and I kept telling Warren about them and he told me "keep your damn mouth shut, those people are not the ones we want, they would play hell with us."

I think I have the information you want, if it is not too late.

However I would have to use a little discretion in my actions until I know just how I stand. You know a burnt child dreads the fire and I had my whiskers *singed* pretty close.

If my dear sir you do not feel interested in this please do me the slight favor as not to mention this letter. Not that I particularly care but I have to live here and would like to do so in harmony with some few people, but not Willis.

Under date of August 9, 1951, W. T. Saye mailed a reply to said letter, a copy of which was also made an exhibit to the motion. It reads as follows:

Due to absence from the office, I have had no opportunity to reply to your favor of August 1st.

Of course, you are right in your assumption that this letter, to say the least, is a complete surprise. You will recall that in my conversations with you prior to the trial, I always made it very plain that I was not

interested in anything except a proper presentation of the actual facts to the court. I have always been a firm believer in the integrity of the courts, and, generally speaking, the members of the Bar and I deal with them on the assumption that they are representing the interests of their clients to the fullest extent, but, of course, always according to the ethics of the profession.

In the absence of a statement from you or an interview revealing exactly what the facts are as you know them, I am not in a position to say whether or not the information would be of any benefit to me. However, I do steadfastly cling to the belief that the doors of courts of justice are never closed against litigants in such a manner as to prevent them from presenting the actual facts, because that is the only way the courts can do justice to litigants. Of course, the courts very properly take the view that there must be an end to litigation, and, therefore, they require any litigant to show diligence in presenting his side of the case.

Thanking you for your interest in the matter I am.

(The motion with exhibits appear in the Record, Vol. XIII, pp. 74 to 81.)

(d) The Motions to Remand were in the nature of an original proceeding in the State Supreme Court. Respondents, defendants in the trial court, filed no denial or response of any kind to said motions. In their brief they made slight reference to the "Motion to Remand" set forth in paragraph (a) and predicated on newly discovered evidence, saying that assuming the facts in the affidavits to be true, they were insufficient to establish a marriage, and that petitioners had failed to show dili-

gence. The "2nd Supplemental Motion" based on the letter of Richard L. Sims was not mentioned. The rule prevails in Louisiana as in most states, that each material allegation of a pleading must be denied or admitted and those not denied are treated as being admitted. (Louisiana Revised Code of Practice 180, 1082: T. 13, par. 3601.)

(e) Sims was a witness for the defendants, and it might be well said, was their star witness, as he has been in a position to know more about the facts pertaining to all the issues than perhaps any other living person. By calling him, respondents vouched for his honesty and integrity. They knew they would be bound by his testimony.

Sims testified (R. 1649-1658, Vol. VIII) in open court, being interrogated by Mr. Warren Hunt, one of the attorneys of record for the defendants, and the attorney referred to in Sims letter above quoted, to the effect that he was staying in Rayville, Louisiana, but lived in Monroe, Louisiana, most of the time; that he was born in Delhi, Louisiana, and lived all of his life there until about 3 years ago; that he lived there all of his life, except for a short time when he was in the Armed Services; that he was in a general way familiar with the Rohnert tract of land; that his father managed and was in charge of said property for Frederick Rohnert from about 1900 until 1932, at which time his father died; and that thereafter witness managed the property for Frederick Rohnert. He was led to state by counsel that he managed the property for Emma Rohnert after about 1934 and that he managed it and continued overseeing it until the death of Frederick Rohnert. He

testified to a quitclaim deed that was made by Frederick Rohnert to Emma Rohnert in 1933, and stated the deed was mailed to him by Frederick Rohnert and he filed it for record. On cross examination (R. 1653, Vol. VIII) he testified he was 53 years old and that he was a cotton buyer, but was not following that business at the present time. On being questioned as to what he was doing at the present time, he stated he was employed by Mr. Hunt, but that his employment was working on a case of Effie Dexter; that Mr. Hunt had him employed going about and getting witnesses. He stated positively that he did not work on this case and had nothing to do with it. He did not remember whether or not the deed contained any revenue stamps and that the letter transmitting it to him by Mr. Rohnert had been destroyed. That he continued to look after this property for Frederick Rohnert in 1934, 1935 and 1936, and that there was no change whatsoever after said deed was executed; and that he had some correspondence with Frederick Rohnert after 1933, but never had any with Emma Rohnert; that Mr. Rohnert mailed him checks to pay the taxes. He stated he never at any time had any correspondence or communication with Emma Rohnert; that he had some correspondence with Mr. Buckley, who was Emma Rohnert's son-in-law, but not until after the death of Frederick Rohnert, and that he did not have any correspondence with Mr. Westfall, an attorney in Milwaukee who represented Mrs. Emma Rohnert, or any one else about said property until after Frederick Rohnert died.

3. Regardless of the holding by the Louisiana Supreme Court that the facts stated in this letter were cumulative evidence, the fact remains that it appears from the face of the record that they were not. It further appears that this case was decided against the petitioners by the State Supreme Court in the face of an undenied motion showing that the testimony of this witness was procured at the instance of the respondents and through their duly authorized attorney of record, by the perpetration of extrinsic and collateral fraud on the trial court pertaining to material issues in the case. Whether or not the issues were material is not an open question. The witness states that "Hunt (Warren Hunt) came to me and asked me if I had signed any contract with the other side, saying to me 'You know I represent Sun, and some of your friends in Delhi and I think we can get together on a few things'."

He then says he went to work for them at a nominal salary, not giving any information because all the information he knew was against Willis, et al. Willis is the landowner who acquired the property through various and sundry conveyances in the form of quitclaim deeds from the collateral heirs of Frederick Rohnert, deceased. All the other defendants claim through and under Willis. The witness then makes the additional statement: "Any way I got for my troubles my salary and when your case came up and was tried in this court, I was paid the *huge* sum of $750.00 and cast adrift." The word "huge" was emphasized by the witness. He then proceeded to state among other things, "I also know people in Detroit that know all about

it, and I kept telling Warren about them, and he told me to 'keep your damn mouth shut these people are not the ones we want, they would play hell with us'."

It is respectfully suggested that the respondents are in no position to question the materiality of the testimony. They, themselves, must have considered it very material; otherwise it cannot be imagined that they would have assumed the risk of entering into a conspiracy and paying a witness to swear falsely in their behalf.

The Nance project referred to in the second paragraph of Sims' letter is with reference to a suit which was finally brought by a part of the collateral heirs at the instance of Nance. Nance at the same time had contacted the relatives of Flora Alward Rohnert, who was an inmate of an insane asylum of Detroit, and without letting them know about his having a contract with the collateral heirs, attempted over a period of some 2 or 3 years to obtain a contract authorizing him to represent Flora.

Purportedly Sims was called as a witness for the purpose of proving physical possession and his connection with the alleged altered deed, but the record in this case shows that there was no one in Detroit that claimed under said deed. Therefore, it is quite obvious that Mr. Sims was familiar with the fact that Frederick Rohnert was married to Flora Alward and knew people in Detroit who could testify to that fact, and that the defendants, respondents here, bribed him to supress such testimony.

At this point it is suggested that it is entirely reasonable to infer from this letter that such conduct on the part of

the respondents was instrumental in making it difficult for petitioners' attorneys to locate witnesses in Detroit who could give more details with reference to the relationship that existed between Frederick Rohnert and Flora Alward Rohnert. This explains our position in including under "QUESTIONS PRESENTED" the original motion and the affidivits which accompanied it. Viewing the evidence filed in support of the first motion in the light of the revelation in Sims' voluntary statements and the utter lack of concern evinced by the respondents at being charged with becoming parties to an unlawful conspiracy to obtain a favorable decision from the trial court based on fabricated testimony, it is reasonable to infer that the entire defense on the issue of marriage was obtained through the same methods.

4. The procedure followed in filing the motions to remand is prescribed by the Louisiana Supreme Court in the very recent case of *Savin v. Savin, 51 So. 2d 41, decided February 12, 1951*, and cases therein cited. In this connection we invite attention to the law pertaining to the scope of review by appellate courts in Louisiana. It is provided by the Constitution of Louisiana, Article 7, par. 10-29, that all appeals in Louisiana are on both law and facts and findings of a jury or trial court are not binding on the appellate court.

It will be observed that in passing on this matter the Supreme Court of Louisiana makes no specific mention of this "2nd SUPPLEMENTAL MOTION" or the exhibits supporting it, merely stating that it is accumulative and if introduced would not change the court's opinion. Thus it

will be seen that the petitioners were in no position to plead a Federal question unless and until it was created by the holding of the Supreme Court. Believing that one of the purposes of the Due Process Clause is to guarantee the right of a fair hearing, your petitioners filed a motion for a rehearing, in which they specifically pleaded it The exact manner in which it was raised appears on page 127 of Vol. XIII of the Record.

## STATEMENT

These actions were brought by Leslie D. Bloom and Ida DuBose as Guardians of Flora Alward Rohnert (sometimes called Flora M., Florence and Florence M. Alward Rohnert) a mentally incompetent person, all of the plaintiffs being residents of Wayne County, Michigan, praying judgment recognizing Flora Rohnert as the surviving spouse in community of Frederick Rohnert, deceased, who was also a resident of Wayne County, Michigan, and for judgment for title to approximately 1108 acres of land in Richland Parish, Louisiana, together with appurtenances and improvements thereon, claiming an undivided one-half interest as the surviving spouse in community of Frederick Rohnert, deceased, and the remaining undivided one-half interest as the sole and only heir at law of the said Frederick Rohnert, deceased, and praying in the alternative, that if the evidence failed to show that the property belonged to the community, that the widow was entitled to an undivided one-fourth interest in said property under *Article 2382 of the Civil Code of Louisiana*, and praying for judgment accordingly.

(Three separate suits were brought. The issues in each being the same and the common source of title the same, all parties claiming under Frederick Rohnert, as before stated, the cases were consolidated for trial and appeal. In the trial court the original petition in suit No. 11,959 appears in Vol. I of the Record, pages 24 to 42; 11,960 in Vol. II, pages 159 to 178; and 12,091 in Vol. III, pages 346 to 364.) In all of said suits plaintiffs allege on information and belief that Frederick Rohnert and Flora Alward entered into an agreement to presently accept each other as man and wife, and that said Frederick Rohnert assured Flora Alward, who at that time was only about 14 years of age, that a common law marriage was as legal as any other marriage under the laws of Michigan; and that his only reason for wanting to avoid a public ceremony was that he desired to keep the wedding secret from certain of his relatives, and especially his sister, Louise Rohnert, who was an old maid and whom he had promised that he would not marry as long as she lived and remained unmarried; that if said marriage was made known to his relatives or people associating with them, who would likely give them the information, it would result in serious financial loss to both him and Flora, because his sister was wealthy and a number of his other relatives were financially well fixed, and he was fearful that they would make provisions whereby he would not inherit any of their property. They also stated that it was agreed that each of the parties would continue to transact business in their own names, describing themselves as single persons until a propitious

time arrived to publicly announce their marriage. Plaintiffs then averred in detail all the conditions under which the parties lived and such other facts as were necessary to establish what amounted to a common-law marriage under the laws of the State of Michigan.

All the defendants filed various and sundry exceptions, pleading no cause of action, res judicata, no right of action, estoppel, and an alleged settlement between the heirs and Flora Rohnert in 1938. All of the pleas were overruled, although the defendants took the testimony of a number of witnesses and introduced large volumes of photostatic copies of records of proceedings in the Michigan Courts to establish the plea of "No Right of Action" and "Res Judicata." They also pleaded prescription, which was referred to the merits. (The various pleadings in Suit No. 11,959 appear in Vol. 1, pages 45 to 158 of the Record.) The pleadings in the other cases are identical. The answer admitted that Frederick Rohnert had promised his sister, Louise Rohnert, that he would remain single and unmarried during her lifetime, and alleged that he kept his promise. In their answer they repleaded all their former pleas and denied all the other allegations with reference to the marriage.

Most of the testimony bearing on the issue of marriage was taken by deposition in Detroit, Michigan. Plaintiffs introduced a number of witnesses who were in daily contact with Mr. and Mrs. Frederick Rohnert covering the period beginning in 1908 or 1909, until Rohnert's death, most of whom lived either in the same building in which

the drug store was located, or directly across the street from the store, and practically all of whom were the closest associates the Rohnerts had. They had all known them as husband and wife, and did not know there was any question about their being married until after Mr. Rohnert died. None of them had heard anything about the marriage being under the common law. They had assumed that they were married from their statements, conduct and general repute in the vicinity where they lived. Yet, the Supreme Court of Louisiana in its opinion states that none of the witnesses testified that Flora was in the drug store, either as an employee or otherwise prior to 1923. Any number of defendants' own witnesses testified exactly to the contrary. However, it is obvious that the Louisiana Court based its decision on the erroneous assumption that an agreement to presently accept each other as husband and wife could not be implied from the statements, representations and conduct of the parties, and that such a contract could be proved only by a written agreement or attending witnesses.

## REASONS FOR WRIT AND ARGUMENT ON ALL POINTS

The present trend of the decisions of this Court seem to indicate an intention to retain the doctrine of flexibility in granting writs claiming deprivation of life, liberty or property without due process of law in violation of the 14th Amendment. No reason appears to be of more importance than upholding the fundamental rights guaranteed by the constitution.

We quote from *Supreme Court Practice* by Robert L. Stern and Eugene Gressman, published by the Bureau of National Affairs, Inc., first paragraph, page 109:

> "But there is no formula which reveals the precise amount of importance which will move the Court to grant certiorari. Importance is a relative factor, dependent upon the type of issue involved, the status of the law on the matter, the correctness of the decision below, and the nature and number of persons who may be affected by the case. There are accordingly a wide variety of considerations which may be pertinent in testing the importance of a case. No single one of them may be sufficient by itself to convince the Court of the importance of the issue decided by the lower court. Where the writ of certiorari is granted, a combination of factors is usually present to lead the Court to believe that the case is sufficiently important to warrant further review. It is therefore wise, in preparing a petition for certiorari, to advance all possible reasons tending to demonstrate the importance of the issues involved rather than to concentrate on any single one. See p. 177, infra."

Beginning on page 113, last paragraph, we find the following statement:

> "But on occasion the Court does accept a case for review for no apparent reason other than error in the lower court decision. And it does so even though there seems to be no conflicting decisions, no novel or important principles of law and no elements of great public interest at stake. It is enough that four or more Justices are so doubtful of the correctness of the decision below that they desire further consideration of the case. THEY MAY BE MOTIVATED BY A FEELING THAT THE DECISION REPRESENTS A GROSS MISCARRIAGE OF JUSTICE OR A

SUBTLE EROSION OF A STATUTORY OR LEGAL PRINCIPLE. OR THEY MAY BELIEVE THAT PROPER SUPERVISION OF THE FEDERAL JUDICIARY DEMANDS THAT THE LOWER COURT BE SET ARIGHT."

The author cites a number of decisions of this court to support his conclusions.

> "Due process of law conveys neither formal nor fixed nor narrow requirements; the real clue to the problem confronting the judiciary in the application of the due process clause is not to ask where the line is, once and for all, to be drawn, but to recognize that it is for the Court to draw it by the gradual and empiric process of inclusion and exclusion." *Wolf v. Colorado, 338 U. S. 25, 93 L. Ed. 1782.*

That the prohibition of the 14th Amendment against depriving any person of life, liberty or property without due process of law extends to all actions of the State, whether through its legislative, its executive or its judicial authorities, has been recognized.

> *Scott v. McNeal, 154 U. S. 34, 14 S. Ct. 1108, 38 L. Ed. 896.*

The rule to control and the legal effect of extrinsic and collateral fraud perpetrated on the court with the effect of such improper and corrupt practices by litigants is layed down in the following cases:

> *U. S. v. Samuel R. Throckmorton, et al., 98 U. S. 93;*
>
> *Chicago, Rock Island & Pacific Railway Co. v. George Callicotte, 267 Fed. 799 (Cert. denied March 7, 1921).*

Many cases are cited and distinguished in the opinion in the last cited case and the rule therein announced has remained unchanged over a long period of years.

Most of the issues or "so-called" issues other than the question of the marriage depend almost entirely on the proposition of whether a valid marriage existed and the decision of that question governs the holding on the collateral issues.

The Louisiana Civil Code Annotated provides:

> (a) That all property acquired by either spouse during the marriage is community. (C. C. A. 2402.)
>
> (b) That "at the time of the dissolution of the marriage all effects which both wife and husband reciprocally possess are presumed common effects or gains unless it be separately proven which of such effects they brought in marriage or which have been given them separately or which they have respectively inherited."
>
> *(C. C. A. 2405);*
>
> Also *11 Amer. Jur., p. 200, par. 41;*
>
> *Henderson v. Wadsworth, 115 U. S. 264, 29 L. Ed. 377;*
>
> *Bruyinckx v. Woodward, et al., 47 So. 2d 478, 217 La. 736.*

Therefore, a release of all right, title and interest of the widow in the estate of her deceased husband would not operate to release her community interest, because it is not any part of the estate of her husband, but her own individual property.

To illustrate, if the parties were married without reference to the merits or demerits of defendants' contention with reference to the altered deed, it would be eliminated from the case because it is unquestionably the law in Louisiana that if a husband disposes of a valuable property to one of his close relations for a nominal consideration, the conveyance is conclusively presumed to have been simulated and made for the sole purpose of depriving his wife of her community interest.

Inasmuch as the alteration appears on the face of the deed, the burden rests on the defendants to show that the alteration was made at the instance of the grantor and prior to its delivery, and the defendants wholly failed to discharge this burden.

*Messi v. Trechede, 37 So. 600, 113 La. 679;*

*Martin v. Creditors, 14 La. Ann. 393;*

*Lewis v. Bureau, 12 Orleans App. 188.*

For the purposes of this petition the following instruments constituting the material parts of the record of the proceedings in this case in the Supreme Court of Louisiana are hereby by reference adopted and made a part hereof. They all appear in Vol. 13 of the Record at the pages enumerated below:

1. Motion to Remand with exhibits 4-57.

2. Supplemental Motion to Remand with exhibits 58-61.

3. 2nd Supplemental Motion to Remand with exhibits 74-81.

4. Opinion of Louisiana Supreme Court dated June 2, 1952, 112-123.

5. Petition for Rehearing, 124-135.

6. Entry showing Rehearing refused, 137.

## CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Life Bldg.,
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*Attorney for Petitioners.*

The names and addresses of counsel for respondents are as follows: Oliver and Digby, Ouchita Bank Building, Monroe, Louisiana; Warren L. Hunt, Rayville, Louisiana; Sholars, Gunby & Guthree, Bernhardt Building, Monroe, Louisiana; Cotton & Bolton, Rayville, Louisiana; Tucker Bronson & Martin, Shreveport, Louisiana; McBride & Goff, Ruston, Louisiana; Tucker, Bronson & Martin, Shreveport, Louisiana; Albritton, Ware, Litton & West, Baton Rouge, Louisiana; John C. Morris, Rayville, Louisiana; Thompson, Thompson & Sparks, Monroe, Louisiana, to each of whom a copy of this petition has been mailed.

W. T. SAYE.

EXHIBIT "A"

# Supreme Court of the United States

*No.* ....., *October Term, 1952*

LESLIE D. BLOOM and IDA DUBOSE, Guardians of FLORA ALWARD ROHNERT,

*Petitioners,*

*v.*

JOHN W. WILLIS, *et al.*

---

## ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

---

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including November 30th, 1952.

HUGO L. BLACK,
*Associate Justice of the Supreme Court of the United States.*

Dated this 29th day of September, 1952.

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

Office-Supreme Court, U.S.
FILED
FEB 16 1953
HAROLD B. WILLEY, Clerk

## No. 474

LESLIE D. BLOOM and IDA DUBOSE, Guardians of Flora Alward Rohnert (T. J. Coenen, Curator for the Absent Heirs of Flora Alward Rohnert, Deceased).

Petitioners,

*versus*

JOHN W. WILLIS, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Louisiana.

## BRIEF OF RESPONDENTS IN OPPOSITION TO ALLOWANCE OF THE WRIT.

GEO. GUNBY,
M. C. THOMPSON,
M. McVEA OLIVER,
Monroe, Louisiana;
WARREN L. HUNT,
W. D. COTTON,
Rayville, Louisiana;
A. K. GOFF,
Ruston, Louisiana;
E. GORDON WEST,
Baton Rouge, Louisiana;
WM. H. BRONSON,
Shreveport, Louisiana;
Attorneys for Respondents.

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# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

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## No. 474

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LESLIE D. BLOOM and IDA DUBOSE, Guardians of Flora Alward Rohnert (T. J. Coenen, Curator for the Absent Heirs of Flora Alward Rohnert, Deceased).

Petitioners,

*versus*

JOHN W. WILLIS, ET AL.,

Respondents.

---

On Petition for a Writ of Certiorari to the Supreme Court of Louisiana.

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## BRIEF OF RESPONDENTS IN OPPOSITION TO ALLOWANCE OF THE WRIT.

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*May It Please the Court:*

### OPINION BELOW.

The opinion and decree of the Supreme Court of Louisiana which is herein sought to be reviewed is reported at *221 La. 893, 60 So. (2d) 415*, and appears in the Record at page 104.

## JURISDICTION.

The opinion and decree was rendered June 2, 1952. The motion of appellants (petitioners herein) for rehearing was denied July 3, 1952 (R. 122). Upon motion to this Court a delay was granted to petitioners to apply for writ of certiorari until November 30, 1952. A printed application for certiorari was served upon respondents' counsel November 30, 1952. Upon further motion by petitioners the time for making service under Rule 38, paragraph 3, was extended to and including January 19, 1953, and service of the printed record was made on respondents' counsel January 23, 1953. Jurisdiction of this Court was invoked in the application under *28 U. S. C. 1257(3)*.

## QUESTION PRESENTED.

The parties plaintiff in the District Court of Richland Parish, Louisiana, (appellants in the Louisiana Supreme Court and petitioners here) asserted title to certain lands in that State and as basis thereof alleged a marriage between one Flora Alward and Frederick Rohnert (deceased in 1936) in Detroit, Michigan, in, or about, or prior to the year of 1893. From an adverse decision, rejecting their demands, plaintiffs prosecuted an appeal to the Supreme Court of Louisiana and, pending a hearing and determination of that appeal, appellants filed motions to remand for further trial on the question of marriage, *vel non*, to which motions were attached several affidavits from parties who had not testified at the trial, but asserted some knowledge of the marital relations of the parties, and an unauthenticated statement in a purported letter, said to have been signed by one Richard L. Sims, who was a witness at the trial to certain matters unrelated

to the asserted marriage, that he thought he had information of importance to plaintiffs' case, but such information was undisclosed by such letter and the motion to which it was attached.

Whether failure of the Supreme Court of Louisiana to remand the case for further evidence, consideration, and decision constituted a denial of due process of law to petitioners under the *Fourteenth Amendment to the United States Constitution* is the only question presented in the petition for certiorari.

## STATUTE INVOLVED.

Seemingly, the only state statute which may be involved is *Article 906 of the Code of Practice of Louisiana*, which provides:

> "But if the court shall think it not possible to pronounce definitely on the cause, in the state in which it is, either because the parties have failed to adduce the necessary testimony, or because the inferior court refuse to receive it, or otherwise, it may, according to circumstances, remand the cause to the lower court, with instructions as to the testimony which it shall receive, to the end that it may decide according to law."

## STATEMENT OF THE CASE.

Although some defenses were pleaded and urged relating to other matters, the primary question presented in this case and the only question passed on by the trial and appellate courts of the State of Louisiana related to whether or not a marriage had been entered into which

would be recognized by the laws and the courts of Louisiana. The record discloses that several volumes of testimony and other evidence were adduced on this question, which were considered by both trial and appellate courts in reaching their decisions. With respect to the motions of appellants to remand and the affidavit and letter exhibits annexed thereto, the Supreme Court of Louisiana said and held *(60 So. (2d) 420)*:

> "Plaintiffs, in the alternative, have moved in writing here that the cases be remanded to the district court for the purpose of permitting all parties litigant to introduce additional evidence relating to the alleged marriage, and they have attached to the motions numerous affidavits and some letters of suggested witnesses in which the substance of the proposed new testimony is recited. From the record we find that plaintiffs' counsel were engaged in this litigation for more than two years in advance of the trial, and, this being true, there appears to be no good reason why the new evidence now sought to be introduced could not have been obtained during that period. But conceding arguendo that counsel used all due diligence in attempting to locate it, the greater part of the asserted newly discovered evidence relates to the above described activities of Flora Alward and Rohnert during their acquaintance and association at the drug store; **it, in the main, is purely cumulative; and, if introduced, it could not change the result herein reached.** The alternative motions to remand, therefore, are overruled." (Emphasis ours).

The witness, Richard L. Sims, testified at the trial of the case respecting matters unrelated to the alleged marriage. He was not questioned on either direct or cross-examination as to the marriage. (R. 45-52). The witness was born and lived in Delhi, Louisiana. He was 53 years old when he testified in September, 1950, (R. 47) and was therefore not born until 1897 and could have had no knowledge of a marriage said to have been contracted in or before 1893, when it is alleged that Flora Alward and Frederick Rohnert were married and subsequently resided in Detroit, Michigan. It is not indicated in the letter of Sims to the attorney for appellants (petitioners here), nor in the accompanying motion to remand, that Sims had any knowledge whatever respecting the alleged marriage or that he could give any testimony relating thereto. (R. 94-101). In the letter reply of the attorney for appellants (petitioners here) to Sims (R. 100) it was said: "In the absence of a statement from you or an interview revealing exactly what the facts are as you know them, I am not in a position to say whether or not the information would be of any benefit to me."

Notwithstanding suggestion is made in their petition for the writ that the witness Sims was bribed and that one of the attorneys for respondents was *particeps criminis* or, at least, guilty of improper conduct with respect thereto, it is said parenthetically and in bold face type at page 12 of the printed Motion for Enlargement of Time, etc., that there was no intendment at any time to

question the integrity and ethics of any one of the opposing counsel.

The assertion of rights under the *Fourteenth Amendment* was first made in application for rehearing in the Supreme Court of Louisiana. No reference was made thereto in denying the rehearing. (R. 122).

## ARGUMENT.

### The Record Was Not Timely Served on Respondents.

Copy of the printed record was ordered to be filed and served January 19, 1953, but was not served until January 23, 1953. Thus Rule 38(3) and the Order of this Court were not complied with.

### A Federal Question Was Not Timely Raised.

A Federal question first raised in an application to the highest court of a state for a rehearing comes too late to serve as basis for review by the United States Supreme Court, where the state court denied the application without reasons given or reference to the Federal question.

*Radio Station WOW, Inc., v. Johnson, 326 U.S. 120, 128, 89 L. Ed. 2092, 2100, 65 S. Ct. 1475;*

*American Surety Co. v. Baldwin, 287 U.S. 156, 162, 77 L. Ed. 231, 235, 53 S. Ct. 98;*

*Citizens National Bank v. Durr, 257 U.S. 99, 106, 66 L. Ed. 149, 152, 42 S. Ct. 15;*

*Godchaux Company v. Estopinal, 251 U.S. 179, 181, 64 L. Ed. 213, 214, 40 S. Ct. 116.*

**A Federal Question Was Not Involved In The Decision of the Louisiana Supreme Court But Only a Question of State Law Relating to Marriage.**

Where the parties have been fully heard in the courts of the state in the regular course of judicial proceedings, a decision involving matters governed by state law does not present a Federal question reviewable by the United States Supreme Court.

*Hammerstein v. Superior Court of Cal., 340 U.S. 622, 623, 95 L. Ed. 586, 587, 71 S. Ct. 521;*

*Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 674, 94 L. Ed. 1194, 1201, 70 S. Ct. 876;*

*Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673, 680, 74 L. Ed. 1107, 1113, 50 S. Ct. 451.*

Matters affecting the remedy are governed by the law of the forum, and a decision of a state court on a matter of state pleading and practice is therefore not reviewable by the United States Supreme Court.

*Central Vermont Ry. Co. v. White, 238 U.S. 507, 509, 59 L. Ed. 1433, 1435, 35 S. Ct. 865.*

In addition, the Supreme Court of Louisiana was not apprised of the information available to the witness Sims or to what he would testify if the cause was remanded. Under these circumstances it was also proper

that the Second Supplemental Motion to Remand be overruled. *Sorbe v. Salavignac, 7 Mart. (N.S.) 124.*

*Articles 180 and 1082 of the Louisiana Code of Practice* cited at page 9 of the petition herein are wholly irrelevant to the matter at hand. *La. R. S. 13:3601* also there referred to relates to "the conduct of civil causes in the district courts." Petitioners are further in error in suggesting that the Supreme Court of Louisiana has jurisdiction of original proceedings in causes appealed to it. The function of that court "is to review the judgments and rulings of inferior courts only on the facts and pleadings presented to them." *Merrill v. Theard, 187 La. 55, 174 So. 107, 108.* It is without jurisdiction and authority to sit as a court of original jurisdiction and try issues there raised for the first time. *Greater New Orleans Homestead Assn. v. Kurner, 171 La. 587, 131 So. 680, 681.*

But even though a Federal question may have been properly and timely raised, where, as here, the state court's decision rests on an adequate and independent non-federal ground, relating to the local law respecting such a question as marriage, the Supreme Court of the United States is without jurisdiction to review and consider correctness of the non-federal ground of the state decision. *Radio Station WOW, Inc., v. Johnson, supra.*

The "guiding rule", it has been said, was laid down in *Lynch v. New York, 293 U.S. 52, 54, 79 L. Ed. 191, 193, 55 S. Ct. 16,* as follows:

"It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but **that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it.** DeSaussure v. Gaillard, 127 U.S. 216, 234, 32 L. Ed. 125, 132, 8 S. Ct. 1053; Johnson v. Risk, 137 U.S. 300, 306, 307, 34 L. Ed. 683, 686, 11 S. Ct. 111; Walter A. Wood Mowing & Reaping Mach. Co. v. Skinner, 139 U.S. 293, 297, 35 L. Ed. 193-197, 11 S. Ct. 528; Eustis v. Bolles, 150 U. S. 361, 366, 367, 37 L. Ed. 1111, 1112, 14 S. Ct. 131; Whitney v. California, 274 U.S. 357, 360, 361, 71 L. Ed. 1095, 1098, 47 S. Ct. 641; Mellon v. O'Neil, 275 U. S. 212, 214, 72 L. Ed. 245, 246, 48 S. Ct. 62." (Emphasis ours).

## CONCLUSION.

The decision of the Supreme Court of Louisiana must be accepted herein as controlling on questions of state practice and procedure and of local law respecting the question of marriage. *American Railway Express Co. v. Kentucky, 273 U.S. 269, 272, 71 L. Ed. 639, 641, 47 S. Ct. 353.* Any order or decree herein relating to a further trial and decision of that question would seem, it is submitted,

to be unavailing. The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted,

GEO. GUNBY,
M. C. THOMPSON,
M. McVEA OLIVER,
Monroe, Louisiana;

WARREN L. HUNT,
W. D. COTTON,
Rayville, Louisiana;

A. K. GOFF,
Ruston, Louisiana;

E. GORDON WEST,
Baton Rouge, Louisiana;

WM. H. BRONSON,
Shreveport, Louisiana;
Attorneys for Respondents.

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**CERTIFICATE.**

I, Geo. Gunby, of counsel for respondents in the foregoing brief, hereby certify that a copy hereof has been served on W. T. Saye, Esq., attorney for petitioners, by mailing same to him at Longview, Texas.

This day of February, 1953.

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FILED
MAR 9 1953
Clerk

In the

# Supreme Court of the United States

OCTOBER TERM, 1952

No. 474

LESLIE D. BLOOM, *et al.*,
*Petitioners,*

*v.*

JOHN W. WILLIS, *et al.*,
*Respondents.*

## ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

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In the

# Supreme Court of the United States

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No. 474

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LESLIE D. BLOOM, *et al.*,

*Petitioners,*

*v.*

JOHN W. WILLIS, *et al.*,

*Respondents.*

---

## ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

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## STATEMENT

Respondents omitted any reference to the alternative claim of petitioners to the Marital Fourth. The marriage and date of marriage are both material issues. If the parties were married prior to January 27, 1893, title to the property described in the deed of that date belonged to the community. The same is true as to the property acquired by deed of April 4, 1893. If the marriage was subsequent to date of acquisition, petitioner would be entitled to the Marital Fourth.

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All emphasis in this brief is ours unless otherwise stated.

—I—

## CONCERNING CLAIM OF UNTIMELY SERVICE OF THE RECORD ON RESPONDENTS

The first reason respondents assign for denying the writ, is untimely service of the printed record. The time for service had been extended to and including January 19, 1953. It was served January 23, two days late as the 19th was a holiday. The delay was caused by a week being consumed in obtaining data from the Clerk of the Louisiana Supreme Court to amend the record to meet a requirement of respondents before their counsel would sign the stipulation agreeing to the parts of the record necessary to print. The stipulation was mailed to the Clerk of this court December 30th and request for deposit of estimated costs was mailed by letter of the Clerk dated January 7th, and deposit sent by return mail. Petitioners asked the Clerk if it would be necessary to petition for additional time, and he answered in the negative. One copy of the printed record was air-mailed to counsel January 20th but was misplaced in the post office in Longview, Texas, and not located and delivered until January 22nd. It was air-mailed by first mail to counsel for respondents and received by him January 23, 1953, two days late. Respondents suffered no harm or inconvenience by reason of the delay, as a complete copy of the record was available to them. They had copies of the stipulation, and printed copies of the petition and all motions, orders and briefs had been delivered to them several days prior to the signing of the stipulation designating the parts of the record to be printed.

— II —

## CONCERNING THE CLAIM THAT A FEDERAL QUESTION WAS NOT TIMELY RAISED

Four cases are cited to support this assignment. None of them support it. They are listed on page 6 of Respondent's brief. The second case listed is *American Surety Company v. Baldwin, 297 U. S. 156, 77 L. Ed. 231, 53 S. Ct. 98.* The opinion of the late Mr. Justice Brandeis, in that case, among other things states:

> "The contention that a federal right had been violated rests on the action of the trial court in entering judgment without giving notice and an opportunity to be heard. *The same ground of objection had been raised throughout the proceedings but solely as a matter of state law.* There had been ample opportunity earlier to present the objection as one arising under the Fourteenth Amendment. (Citing cases.) This is not a case where, as in Saunders v. Shaw, 244 U. S. 317, 320, 61 L. Ed. 1163, 1165, 37 S. Ct. 638, *the federal claim arose from the unanticipated disposition of the case at the close of the proceedings in the State Supreme Court.*"

In *Saunders v. Shaw, 244 U. S. 317, 61 L. Ed. 1163, 37 S. Ct. 638,* the opinion was by Mr. Justice Holmes, the great dissenter, who needs no recommendations to this Court. In a unanimous decision this Court stated the rule as follows:

> "Of course ordinarily that would not be enough. But when the act complained of is *the act of the supreme court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to*

*add to the record, it would leave a serious gap in the remedy for infraction of constitutional* rights if the party aggrieved in such a way could not come here. The defendant was not bound to contemplate a decision of the case before his evidence was heard, and therefore was not bound to ask a ruling or to take other precautions in advance. The denial of rights given by the 14th Amendment need not be by legislation. Home Teleph. & Teleg. Co. v. Los Angeles, 227 U. S. 278, 57 L. Ed. 510, 33 Sup. Ct. Rep. 312. *It appears that shortly after the supreme court had declined to entertain the petition for rehearing the plaintiff in error brought the claim of constitutional right to the attention of the chief justice of the state by his assignment of errors. We do not see what more he could have done.*"

Again quoting:

"The intervening defendant thereupon applied for a rehearing, but the court declined to consider the application under its rule that only one rehearing should be granted. He now brings this writ of error and says that he has been deprived of due process of law, contrary to the 14th Amendment, because the case has been decided against him *without his ever having had the proper opportunity to present his evidence.* Technically this is true, for when the trial court ruled that it was not open to the plaintiff to show that his land was not benefited, the defendant was not bound to go on and offer evidence that he contended was inadmissible, in order to rebut the testimony already ruled to be inadmissible in accordance with his view. The chief justice and Mr. Justice O'Niell were of opinion that the case should be remanded to the trial court, we presume upon the ground just stated. *Probably the majority of the supreme court thought that it was so plain on the uncontroverted facts that the case was within the principle of the Myles Salt Co. Case that to remand it would be an empty form,—a mere*

*concession to technicality. It may turn out so, but we do not see in the record an absolute warrant for the assumption, and therefore cannot be sure that the defendant's rights are protected without giving him a chance to put his evidence in.*

"The question remains whether the writ of error can be maintained. *The record discloses the facts but does not disclose the claim of right under the 14th Amendment until the assignment of errors filed the day before the chief justice of the state court granted this writ.*"

The two cases previously cited furnish all the authority needed.

However, the other authorities cited by respondent will be briefly discussed and some of the recent cases cited, apparently the cases are all in accord.

*Godchaux Company v. Estopinal, 251 U. S. 179, 64 L. Ed. 213, 40 S. Ct. 116,* relied on by respondents is not in point. It was brought to this court on writ of error to review a decree of the district court of the Parish of St. Benard, Louisiana, and the action of the Supreme Court of Louisiana. The alleged federal question was available to the petitioner when the suit was filed in the district court and throughout the litigation. Of course, it should have been pleaded and urged in the trial court and in all subsequent proceedings in both of the State courts. The question was not raised until petition for rehearing was filed in the State Supreme Court. This court held it was too late, "*unless the court actually entertains the petition and passes on the point.*"

The above case is expressly distinguished in *Great Northern R. Co. v. Sunburst Oil & Refining Co., 287 U. S. 358, 71 L. Ed. 360.*

Additional cases supporting petitioners' contention are listed below:

*International Steel & Iron Company v. National Surety Co., 297 U. S. 657, p. 666, 80 L. Ed. 961;*

*Honeyman v. Hanan, 300 U. S. 14, p. 26, 81 L. Ed. 477;*

*Great Northern R. Co. v. Sunburst Oil & Refining, 287 U. S. 358, 71 L. Ed. 360.*

Respondents also cited *Citizens National Bank v. Durr, 257 U. S. 99, 106 L. Ed. 149, 42 S. Ct. 15,* as supporting their contention that the federal question could not be raised in the petition for a rehearing, but the court held squarely the other way. The petitioners filed in this court a petition for writ of error, and for writ of certiorari. The writ of error was dismissed because not the proper mode of review, but the application for a writ of certiorari was granted and the case affirmed because there was no federal question in the case.

*Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U. S. 673, 680, 74 L. Ed. 1107, 1113, 50 S. Ct. 451.*

This case also relied on by respondents was on a writ of certiorari to the Supreme Court of the State of Missouri to review a judgment affirming a judgment of the Circuit

Court for Henry County, dismissing a bill filed to enjoin the collection in part of a tax based on an alleged discriminatory assessment. The writ was granted. It was decided June 2, 1930, opinion by the late Justice Brandeis. We quote the following, which shows the basis of the Court's holding:

> "But our decision in the case at bar is not based on the ground that there has been a retrospective denial of the existence of any right or retroactive change in the law of remedies. We are not now concerned with the rights of the plaintiff on the merits, although it may be observed that the plaintiff's claim is one arising under the Federal Constitution, and, consequently, one on which the opinion of the state court is not final; or with the accuracy of the state court's construction of the statute in either the Laclede Land & Improv. Co. case or in the case at bar. Our present concern is solely with the question whether the plaintiff has been accorded due process in the primary sense,—whether it has had an opportunity to present its case and be heard in its support. Undoubtedly, the state court had the power to construe the statute dealing with the state tax commission; and to reexamine and overrule the Laclede Land & Improvement Co. case. Neither of these matters raises a federal question; neither is subject to our review. *But, while it is for the state courts to determine the adjective as well as the substantive law of the state, they, must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it.* Compare Postal Teleg. Cable Co. v. Newport, 247 U. S. 464, 475, 476, 62 L. Ed. 1215, 1220, 1221, 38 Sup. Ct. Rep. 566."

## — III —

## THE QUESTION OF PETITIONERS' CONSTITUTIONAL RIGHTS AND FEDERAL JURISDICTION

The following statement is quoted from brief of respondents (page 6):

**"Whether failure of the Supreme Court of Louisiana to remand the case for further evidence, consideration, and decision constituted a denial of due process of law to petitioners under the Fourteenth Amendment to the United States Constitution is the only question presented in the petition for certiorari."**

The petitioners agree.

The following is also a quotation from respondents' brief (page 6):

**"The assertion of rights under the Fourteenth Amendment was first made in application for rehearing in the Supreme Court of Louisiana. No reference was made thereto in denying the rehearing. (R. 122.)**

Petitioners also agree with this statement.

With reference to the last statement of respondents, it is submitted, that they could have, with the same frankness, admitted that the sole question presented as stated in their first quotation as being the only issue presented in the petition for certiorari did not arise and was not in the case in any way prior to the decision of the Supreme Court

of Louisiana. It is just as plain from the record that the petitioners' claim, whether good or bad, originated and was brought into existence by that decision; it was born and is the child of that tribunal. Moreover, the Supreme Court of Louisiana is the state agency that is charged by the petitioners with having so exercised its powers, or claimed powers, to deprive them of their constitutional rights.

**The next claim of petitioners is that the prohibition of the 14th Amendment of the National Constitution against depriving any person of life, liberty or property without due process of law extends to all actions of the state, whether through its legislative, its executive of its judicial authorities.**

As above stated petitioners also claim, and have consistently done so, since this suit was filed, that the infringement of their constitutional rights was the holding of the Louisiana Supreme Court in denying their second motion to remand. The allegations of the motion and the accompanying exhibit show that R. L. Sims, who was a witness for respondents in the trial court, stated that a part of his testimony at the trial was false and that he had previously advised one of the attorneys of respondents that he knew witnesses in Detroit who knew all about the *Rohnert* case. The attorney suggested to him that he knew he had a lot of friends in Rayville and he thought they could get together, after having first found out the witness had not been interviewed by anyone representing the petitioners; that he

then accepted a bribe from the attorney and agreed to stay away from petitioners and not disclose the names of the witnesses or their whereabouts; and that the attorney employed him and gave him a nominal salary, not revealing just what he meant by nominal; paid him $750.00 to appear in court and testify, and the agreement was fully performed on his part. None of the matters alleged in the motion have ever been denied in any way by any one of the respondents or counsel representing them. They have answered in this court, as they did in the state court, offering many technical excuses why they should not be required to answer.

Under the aforesaid statement of facts the petitioners were denied a fair trial by the criminal acts of the respondents and the holding of the Louisiana Supreme Court denying them any relief.

This does not present a case where an attempt has been made to inject a federal question into a case and invoke federal jurisdiction based on the fact that in the course of the trial a witness or a number of witnesses, whichever the case might be, sometime subsequent to the trial repudiated his testimony, in whole or in part, and made statements that he had sworn falsely and perjured himself. Cases of that kind have ordinarily been tried on motion for a new trial in the trial court, and that court after examining the motion and verification thereof, whatever testimony may accompany it, which may be in affidavit form, in open court, or on depositions. The other side can either contest it and offer evidence in opposition or decide that

the motion together with the supporting brief as a matter of law states no grounds for granting a new trial and submit it without offering testimony. In either case the rights of all parties are preserved and the case may proceed accordingly. In such cases the surprise testimony is discovered before appeal has been perfected.

Upon termination, if the state court of last resort decides either way its decisions are final. In cases of that type the same proposition may arise after jurisdiction has passed out of the trial court and the proceedings are handled according to law, and the rules and regulations of the court to which the litigant properly applies for relief. Under some circumstances such matters are handled by motions to reverse and remand based on newly discovered testimony, the method being prescribed by the forum in which it is heard, but in all cases provision is made for some kind of a hearing, and the fact that the court might deny it peremptorily does not mean that the party has been deprived of his day in court.

Moreover, the fact that the court committed error in so holding has nothing to do with a federal question. Many cases are perhaps wrongly decided by all courts, as is evidenced by so many split decisions, and that is recognized as not being of any importance whatever in this matter. We are not talking about that kind of a case. This is a case in which our reasons have been already stated. Upon learning of the occurrence by receipt of the letter from Mr. Sims, petitioners' counsel frankly submitted the letter to counsel for the other side, telling them that unless

he received some kind of an explanation and denial supported by creditable facts, it would be necessary for him to file a motion to remand, because if the statements in the letter were true, it was a clear case of a litigant resorting to criminal action and corruption and starting the machinery calculated to perpetrate a fraud upon the court and at the same time secretly create a situation that would be an insuperable obstruction in the way of the opposing litigant obtaining a fair and impartial trial.

The motion was filed, and as stated in the brief of respondents on page 3, the only statute pertaining to such procedure is *Article 906* of the *Code of Practice of Louisiana* as quoted. While the statute makes no reference to a particular class of cases, it clearly authorizes and even suggests that the proper method would be to file a motion in that court seeking appropriate relief, and that procedure seems to be the recognized and approved form. In any event petitioners have found no case to the contrary and respondents admit that they have found none. It was approved in the case of *Savin v. Savin, La. Sup. Ct., 51 So. 2d 41, decided February 12, 1951.* Apparently there is not now any question in the case concerning procedure.

As above stated, this court should find it unnecessary to look beyond the motions to remand which were filed in the Supreme Court and the supporting affidavits to enable it to decide the only question before it on petition for certiorari. One copy of the entire record is available to the court, as is also the part of the record that was printed, and,

of course, it can examine any part of the entire record that it sees fit, if it believes that it would throw any light on the question of whether or not the writ should be granted.

Respondents have now filed all that they are entitled to file in this case, unless they should find reason to ask leave of the court to file something additional. Petitioners have respondents' final word concerning the subject matter of the 2d Supplemental Motion to Remand, and in the light of what respondents state, we will summarize our views of what is before this court at this time that supports petitioners' claim to have the writ granted, and the case reviewed by this court.

The principal argument offered by respondents is based on the assumption that Sims' statement does not show what he knew, and that the burden of showing what would be revealed by his testimony was on the petitioners and that they failed to meet the burden. Petitioners very seriously doubt if that contention is supported by any authority in actions of this kind, that is, if there ever was another case exactly like it. At any rate, petitioners believe some discussion of the contents of the letter would be beneficial in properly deciding that issue.

The 2nd Supplemental Motion to Remand, accompanying verification, and supporting affidavit, appears in the printed record as follows: The motion on page 94; supporting affidavit of W. T. Saye, page 96; replica of envelope in which the letter of R. L. Sims to W. T. Saye was received, page 98; and letter of R. L. Sims to W. T. Saye

dated August 1, 1951, signed by R. L. Sims, page 99, and the letter of W. T. Saye to R. L. Sims in reply dated August 9, 1951, page 100.

Attention is first directed to paragraph No. 3 of the Motion to Remand. It will be noted that in subdivision (c), petitioners had the following to say concerning what the letter contained about the issue of marriage:

> "(c) The statements contained in said letter, if true, strongly support the contention of Plaintiffs-Appellants that the true facts, not only concerning the marriage relationship of Frederick and Flora Rohnert, but also other material issues in the case were concealed and that the Defendants-Appellees knowingly and for the purpose of concealing and suppressing the facts, failed and refused to call witnesses who were in a position to testify to such facts and that they were not called because the Defendants-Appellees knew that their testimony would be unfavorable to Defendants'-Appellees' contentions."

As no response or denial of any af the facts set forth in the motion or the exhibits to the motion, and as the motion is verified by affidavit, admissible in evidence unless the genuineness of the signature or authenticity is questioned and raised at the time. For the first time in this entire proceeding that issue has been suddenly raised in respondents' brief. Under the circumstances under which this letter was filed and the action of counsel in interviewing opposing counsel prior to the filing, and discussing it with him, and respondents having at no time questioned the genuineness or authenticity of the letter, they are es-

topped to do so at this time. In addition, no action by the Supreme Court of Louisiana is based on any objection to the manner of procedure, and that court considered all the motions to remand and the accompanying exhibits as being properly before it, so that matter is foreclosed.

The law of Louisiana pertaining to public bribery is first quoted below, followed by the penalties prescribed for perjury:

**"P18—Public Bribery—**

"Public bribery is the giving or offering to give, directly or indirectly, anything of apparent or prospective value to any of the following persons, with the intent to influence his conduct in relation to his position, employment or duty:

(1) Public Officer or Public Employee; or

(2) Election Official at any general, primary, or special election; or

(3) Grand or Petit Juror; or

(4) *Witness, or person about to be called as a witness, upon a trial or other proceeding before any court, board, or officer authorized to hear evidence or to take testimony.*

"The acceptance of, or offer to accept, directly or indirectly, anything of apparent present or prospective value, under such circumstances, by any of the above named persons, shall also constitute public bribery.

"Whoever commits the crime of public bribery shall be fined not more than one thousand dollars, or imprisoned, with or without hard labor, for not more than five years, or both."

*Louisiana Revised Statutes, Art. 14, par. 118;*

*West's Louisiana Statutes Annotated, Revised Statutes of 1950, Vol. 9, pages 588-589;*

*Act No. 43, Acts of 1942 Session of the Legislature of the State of Louisiana, as amended down to 1950.*

Art. 14, par. 123, provides that a person committing perjury shall be fined not less than $1,000.00 or not more than five years imprisonment at hard labor, or both.

*West's Louisiana Statutes Annotated, Vol. 9, pages 603-604.*

The record, therefore, clearly discloses the undenied fact that the respondents acting through counsel, deliberately perjured a witness for the purpose of inducing him to swear falsely and suppress testimony that counsel itself stated would "play hell with us," which can have no meaning other than that it would destroy their defense of this lawsuit. No further words need be wasted arguing this.

Petitioners are of the opinion that the materiality of the contents of the letter is admitted. Sims advised counsel for respondents that he knew people in Detroit who knew all about it, undoubtedly referring to the lawsuit and the evidence to be used, as that was the only subject under discussion. Counsel replied telling the witness to keep his damn mouth shut, that these people were not the ones they wanted. If this does not show on its face a brazen act of colluding and tampering with a witness, bribing him, fabricating testimony and conspiring to suppress the produc-

tion of testimony of witnesses who knew the truth, and thereby defeat the claim of petitioners without due process of law by preventing their obtaining judgment based on anything resembling a fair hearing, we cannot choose words that would more clearly show what their purpose was and which would more clearly show that counsel knew the exact nature of the testimony that he was colluding and conspiring to suppress and was willing to pay to see that it was suppressed.

We wonder if anybody seriously expects a court to believe that men of the learning and intelligence of counsel for respondents are sincere in their argument that this evidence was immaterial. The all important question arises and is unanswered here: What were they paying for and why were they flirting with the risks involved in, and the consequential penalties of committing the various offenses that could result from their conduct? It is inconceivable that this was all done as a mere gesture of some kind. Of course, as stated, there seems to be no way within the powers of the petitioners to obtain an expression, one way or the other, from any of the respondents or their counsel as to why they have not long, long ago denied these charges if Sims was not telling the truth, and frankly, if there was not something wrong, it would have been denied long ago. It is one of those things that does not suggest raising any number of technical reasons, if they were in position to show Sims was not telling the truth. Common honesty and the slightest inclination toward fair dealing would dictate not only a denial, but a complete submission of whatever

proof that might be necessary to show that they were not guilty of what he charges.

We have nothing further to say concerning the materiality of this letter, but we would like to very strongly urge that even if it be conceded that the evidence referred to in the letter had no bearing whatever on the case, it would still have no bearing on the question of a fair trial, and whether or not the writ of petitioners should be granted. It is so well established that fraud vitiates everything into which it enters that in the state of the record, there is no view that can be taken justifiably other than that no court is justified in believing or giving effect to one single word of evidence that was offered by respondents in this entire case. Frankly, if they are guilty of the charges made by Sims, it is obvious that there is no limit to the extent that they would go to defeat justice, and litigants are entitled to have their constitutional rights determined in a wholly different atmosphere from this. No hesitation whatever should be shown in requiring that the case be put back like it was before the proceedings started. In short, it should be expunged from the records.

There is one other matter that so far has gone unnoticed; that is, that the question of the binding effect of a state court governing the applicable laws of the state in which the court is located. In this case, the only question of Louisiana law that has been decided was not even in issue. That question is stated under respondents' heading "Statement of the Case" in which it is stated that the only question passed on by the trial and appellate courts of Louisiana

related to whether or not a marriage had been entered into which would be recognized by the laws and courts of Louisiana. The opinion of the Louisiana Supreme Court had this to say on the subject: "With respect to this paramount issue of marriage, all parties agree that the following observations contained in the brief of appellees' counsel are correct (PR 106):

> "A marriage such as it alleged upon in these proceedings is not recognized by our laws, but, out of comity, the Courts of this State will give effect to any marriage valid under the laws of the state where the parties reside. Succession of Marinoni, 177 La. 592, 148 So. 888. Michigan recognized common-law marriage, and since Flora Alward and Frederick Rohnert were both resident of that State, we must look to the laws thereof in order to determine if the marriage existed."

So as a matter of fact there was no issue in the case based on Louisiana law. The question of marriage admittedly depends upon the laws of Michigan, and the court and counsel for both sides all agree that the court decided nothing except that issue. Therefore, the question of this court interfering with the decision of the courts of Louisiana in respect to Louisiana law is not involved. In our opinion, we can show by Michigan decisions and also by decisions of this court that it did not correctly construe and apply the Michigan law, but no purpose would be served by doing so in this proceeding at this time.

Another matter that has been argued somewhat thoughtlessly is the question of fact finding by the Louisiana court.

A finding of a court on an undisputed fact is a law question. Counsel for respondents say that the Supreme Court of Louisiana having held that the affidavits and other evidence offered in support of all three motions to remand were cumulative and petitioners are bound by that holding. From the language used it does not appear from the opinion that this statement was intended to apply to the 2nd Supplemental Motion, which pertains to the Sims letter. The court said that the testimony in the main was purely cumulative and if introduced could not change the result. That statement could not be truthfully applied to the Sims transaction, because the court could not know whether or not it would change the result. The fact that its contents had not been denied should have changed the result at that moment, but at any rate the fact finding is not very strong. The court (PR 109) made the statement that there was no evidence whatever in the record having any tendency to indicate the existence of the relationship of marriage prior to the year 1923. Without arguing that proposition here, and showing that there was much stronger evidence offered by defendants themselves, to support a marriage relationship existing prior to 1923 than subsequent to 1923, the point we wish to make is that if the statement of the court be accepted as true, then it follows that the affidavits supporting petitioners' 1st Motion to Remand could not possibly be cumulative in any respect. Five of them state facts we believe most courts would hold had much more than a mere tendency to establish a marriage relationship under the common law, so the court itself destroyed the legal ef-

fect of its holding about the proposed evidence being cumulative.

Respondents' suggestion that petitioners' counsel had the opportunity to question Witness Sims concerning the marriage on his cross examination but neglected to do so, is easily answered. He was not questioned about the marriage on direct examination. The fact that counsel for petitioners would have made him his witness and been bound by his testimony is a sufficient answer.

Concerning the contention that the State Supreme Court did not pass on the federal question; it was squarely raised in the petition for a rehearing, and the court either decided it against petitioners or evade it. In either event, the case was ripe for appeal or application for writ.

The real party-plaintiff in interest was the woman claiming to be the widow of Frederick Rohnert, deceased. She had been a duly adjudged mental incompetent since the year 1932, with the exception of a little over two years from the latter part of 1938 to her reincarceration in 1940. During the latter period she was virtually penniless, unable to work, and lived on what meagre funds she received from the Welfare Department. Since this action was instituted by her guardians until her death while the case was pending in the Louisiana Supreme Court, she was, of course, a ward of the court, and entitled to its protection, and that regardless of any dereliction on the part of counsel. It is hardly necessary to mention that counsel with no available client to assist him or confer with in a case involving evidence over such a long period of time was indeed

seriously handicapped from the start. This is particularly true in a city like Detroit which has undergone so many changes during that period of time, causing shifts in the population. Not a living relative that had very much information or knew anything about this woman's past was available.

There is one statement that we will add, and that is that of all the witnesses who were produced and who testified by deposition or in court for either the plaintiff or defendant, not one testified that they had ever known or heard of this woman committing an immoral act and not one testified that she was ever known to have kept company with any man other than Frederick Rohnert, or that they ever knew of Frederick Rohnert going with or being with any other woman except some of his lady relatives, who occasionally visited the store. To say the least, it is unusual for a man to have either a mistress, concubine or harlot for that period of time and her live through it without anyone being able to besmirch her character, unless it was the man she claimed was her husband. These are facts that should be taken into consideration in deciding any lawsuit; as it shows the equality of opportunity to present all the true facts to the court.

It is perhaps not necessary to cite any further cases on the constitutional questions involved, but the following cases are in line with those already cited by petitioners:

*Annotation, 42 L. Ed. 865;*

*Snyder v. Mass., 291 U. S. 97, 78 L. Ed. 674;*

*Powell v. Alabama, 287 U. S. 45, 77 L. Ed. 158;*

*Blackmer v. U. S., 284 U. S. 421, 76 L. Ed. 375;*

*L. & N. v. Western Union, 234 U. S. 369, 58 L. Ed. 1356.*

Respectfully submitted,

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W. T. SAYE.

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In the

# Supreme Court of the United States

OCTOBER TERM, 1952

No. 474

LESLIE D. BLOOM, *et al.*,
*Petitioners,*

*v.*

JOHN W. WILLIS, *et al.*,
*Respondents.*

## PETITION FOR A REHEARING ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

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In the

# Supreme Court of the United States

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No. 474

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LESLIE D. BLOOM, *et al.*,

*Petitioners,*

*v.*

JOHN W. WILLIS, *et al.*,

*Respondents.*

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## PETITION FOR A REHEARING ON ORDER OF MARCH 16, 1953 DENYING WRIT OF CERTIORARI

---

Petitioners respectfully pray for a rehearing and reversal of the order hereinbefore entered on the 16th day of March, 1953, denying their petition for a writ of certiorari to the Supreme Court of the State of Louisiana, on the following grounds:

1. In keeping with its usual practice, this Court has indicated no reason for denying the petition. If the decision is based on the view that it is necessary that the record affirmatively show; first, that the Supreme Court of Lou-

isiana considered and passed on the Federal Question raised in the petition for a rehearing in that court, and, second, that even if the state court did decide the Federal Question, its decision might be upheld by reason of an adequate non-federal question to support it, petitioners respectfully submit that they should be granted the privilege of applying to the state court for a certificate stating the grounds of its decision, and they, therefore, pray that the order denying the writ be revoked and that they be given a reasonable time in which to make and present an application for such a certificate.

2. If the petition was denied as a matter of judicial discretion, unsupported by logic or established principles of justice, the decision was beyond the powers of this Court, is a nullity, and should be vacated and the petition decided in accordance with law, justice and good conscience.

Respectfully submitted,

.....

*Attorney for Petitioners.*

I hereby certify that the above petition for rehearing is presented in good faith and not for delay and that said petition is restricted to the grounds above specified.

Dated March 28, 1953.

.....

*Attorney for Petitioners.*

## STATEMENT AND SUPPORTING BRIEF

### I.

### REASON NO. 1

Reason or Ground No. 1 is amply supported by the following authorities:

*Hammerstein v. Superior Court of California, 340 U. S. 622, 95 L. Ed. 586;*

*Herb v. Pitcairn, 324 U. S. 117, 89 L. Ed. 789;*

*Minnesota v. National Tea Co., 309 U. S. 551, 84 L. Ed. 920;*

*Young v. Ragan, 337 U. S. 235, 93 L. Ed. 1333;*

*Darr v. Burford, 339 U. S. 200, 94 L. Ed. 761;*

*Ex Parte Henry Hauk, 321 U. S. 114, 88 L. Ed. 572.*

In *Minnesota v. Superior Court of California*, supra, this Court, speaking through Mr. Justice Douglas, made the following observations:

> "Enough has been said to demonstrate that there is considerable uncertainty as to the precise grounds for the decision. That is sufficient reason for us to decline at this time to review the federal question asserted to be present, Honeyman v. Hanan, 300 U. S. 14, 81 L. Ed. 476, 57 S. Ct. 350, consistently with the policy

of not passing upon questions of a constitutional nature which are not clearly necessary to a decision of the case.

"But that does not mean that we should dismiss the petition. This Court has frequently held that in the exercise of its appellate jurisdiction it has power not only to correct errors of law in the judgment under review but also to make such disposition of the case as justice requires. State Tax Commission v. Van Cott, 306 U. S. 511, 83 L. Ed. 950, 59 S. Ct. 605; Patterson v. Alabama, 294 U. S. 600; 79 L. Ed. 1082, 55 S. Ct. 575.

"It is important that this Court not indulge in needless dissertations on constitutional law. It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions. But it is equally important that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the Federal Constitution of state action. Intelligent exercise of our appellate powers compels us to ask for the elimination of the obscurities and ambiguities from the opinions in such cases. Only then can we ascertain whether or not our jurisdiction to review should be invoked. Only by that procedure can the responsibility for striking down or upholding state legislation be fairly placed. For no other course assures that important federal issues, such as have been argued here, will reach this Court for adjudication; that state courts will not be the final arbiters of important issues under the Federal Constitution; and that we will not encroach on the constitutional jurisdiction of the states. This is not a mere technical rule nor a rule for our convenience. It touches the division of authority between state courts and this Court and is of equal importance to each. Only by such explicitness can the highest courts of the states and this Court keep within the bounds of their respective jurisdictions."

> "For these reasons we vacate the judgment of the Court of Minnesota and remand the cause to that court for further proceedings." *Minnesota v. National Tea Co., 309 U. S. 551, 559; 84 L. Ed. 920.*

Many other cases of like import might be cited, but these should be sufficient. Some of these cases involve petitions for writ of habeas corpus and involve the rights of persons claiming to be unlawfully confined in prison while others pertain to petitions for writs of certiorari involving individual property rights. This court's decisions show, without exception that where the legal principle involved is the same, it is of no importance whether the case is civil or criminal, or is presented by certiorari or habeas corpus.

## II.

## REASON NO. 2

The question raised by this proposition is of utmost importance. It challenges the validity of procedural practice that by operation and effect may be used as an instrumentality for nullifying a substantial Constitutional Right.

Judicial discretion is defined in *Ballentine's Law Dictionary, Second Edition (1948)*, as follows:

> "In its technical legal sense, judicial discretion is the name of the decision of certain questions of fact by the court. 'A close attention to the difference between fact and law, and the difference between an exercise of judicial discretion (unfortunately so-called) and a

decision of law, will remove much of the obscurity in which the subject of relevancy of evidence has been involved.' See Darling v. Westmoreland, 52 N. H. 401, 13 Am. Rep. 55.

"Judicial discretion is not an arbitrary power, but a judicial one, governed and directed by known and established rules. It is nothing more nor less than a discretion to do in any particular case what the ends of justice demand. See Sioux Falls v. Marshall ... S. D. ..., 45 A. L. R. 447, 451, 204 N. W. Rep. 999."

ABUSE OF DISCRETION: Dr. Ballentine defines as follows:

"The expression does not mean only the decision of a case by whim or caprice, arbitrarily, or from a bad motive, but it also means that the discretion has not been justly and properly exercised under the circumstances of the case. It has also been held to mean such an abuse as amounts practically to a denial of justice. In this view it signifies a clearly erroneous conclusion and judgment; one that is clearly against the logic and effect of the facts presented. See 56 Am. Jur. 75."

In *Black's Law Dictionary, Second Edition, Judicial Discretion* is defined as follows:

"A liberty or privilege allowed to a judge, within the confines of rights and justice, but independent of narrow and unbending rules of positive law, to decide and act in accordance with what is fair, equitable, and wholesome, as determined upon the peculiar circumstances of the case, and as discerned by his personal wisdom and experience, guided by the spirit, principles and analogies of the law. Osborn v. United States Bank, 9 Wheat. 866, 6 L. Ed. 204; Ex parte Chase, 43 Ala. 310; Lent v. Tillson, 140 U. S. 316, 11 Sup.

Ct. 824, 35 L. Ed. 419; State v. Cummings, 36 Mo. 278; Murray v. Buell, 74 Wis. 14, 41 N. W. 1010; Perry v. Salt Lake City Council, 7 Utah 143, 25 Pac. 998, 11 L. R. A. 446.

"When applied to public functionaries, discretion means a power or right conferred upon them by law of acting officially in certain circumstances, according to the dictates of their own judgment and conscience, uncontrolled by the judgment and conscience of others. This discretion undoubtedly is to some extent regulated by usage, or, if the term is preferred, by fixed principles. But by this is to be understood nothing more than that the same court cannot, consistently with its own dignity, and with its character and duty of administering impartial justice, decide in different ways two cases in every respect exactly alike. The question of fact whether the two cases are alike in every color, circumstance, and feature is of necessity to be submitted to the judgment of some tribunal. Judges v. People, 18 Wend. (N. Y.), 79, 99.

"Lord Coke defines judicial discretion to be '*discernere per legem quid sit justum*,' to see what would be just according to the laws in the premises. It does not mean a wild self-willfulness, which may prompt to any and every act; but this judicial discretion is guided by the law (see what the law declares upon a certain statement of facts, and then decide in accordance with the law), so as to do substantial equity and justice. Faber v. Bruner, 13 Mo. 543.

"True, it is a matter of discretion; but then the discretion is not willful or arbitrary, but legal. And, although its exercise be not purely a matter of law, yet it 'involves a matter of law and legal inference,' in the language of the Code, and an appeal will lie. Loviner v. Pearce, 70 N. C. 171.

"In criminal law and the law of torts, it means the capacity to distinguish between what is right and wrong, lawful or unlawful, wise or foolish, sufficient-

ly to render one amenable and responsible for his acts. Towle v. State, 3 Fla. 214.

"*Judicial Discretion, Legal Discretion:* These terms are applied to the discretionary action of a judge or court, and mean discretion as above defined, that is, discretion bounded by the rules and principles of law, and not arbitrary, capricious, or unrestrained."

If the Court's decision was based on an arbitrary application of judicial discretion, or, in other words, the petition denied without reasonable grounds and without any regard to the fair, equitable, and wholesome administration of justice, it is, of course, beyond the authority and power of this Court. Under our system of government, no department of government or tribunal lawfully possesses such power. If it exists at all, it rests in the people and they alone can delegate it.

The Constitution must be considered and interpreted as a whole, and with reference to the common law. The common law has never sanctioned or tolerated the abuse of judicial discretion. Nevertheless, if a litigant is denied relief or a right by this court, whatever the reason may be, he is necessarily bound to accept it, because there is no appeal from its decisions. They are final, whether right or wrong, and it is futile to argue otherwise.

The following cases, it seems, conclusively show that petitioners have been denied the right of a fair trial by decision without reasonable grounds to support it.

In *White v. Ragan* and *Lutz v. Ragan, 324 U. S. 760; 89 L. Ed. 1348*, which was consolidated with the case of *White v. Ragan*, supra, in this Court, it is stated in the opinion

of the Court as follows: "It was alleged that the prosecuting attorney induced and procured this testimony by bribery of the witnesses; and that he introduced it at the trial, with knowledge that it was false. Attached to the petition are the affidavits of the two witnesses in question, each stating that his testimony at the trial was false and that he was bribed to give it by the prosecuting attorney. The affidavits of two other persons, also attached to the petition, tend to corroborate the affidavits of the two witnesses.

*Since the Supreme Court of Illinois dismissed both petitions without requiring respondent to answer, we must assume that the petitioners' allegations are true. Williams v. Kaiser, 323 U. S. 471, 473, 474, ante 362, 65 S. Ct. 363; House v. Mayo, No. 921, decided February 5, 1945 (342 U. S., 42, ante, 739, 65 S. Ct. 517.)*

In *Williams v. Kaiser, 323 U. S. 471, 473; 89 L. Ed. 398, 401*, opinion by Mr. Justice Douglas, it is stated: "The petition for habeas corpus was denied without requiring the State to answer or without giving petitioner an opportunity to prove his allegations. And the allegations contained in the petition are not inconsistent with the recitals of the certified copy of the sentence and judgment which accompanied the petition and under which petitioner is confined. *Hence we must assume that the allegations of the petition are true.*"

In a percuriam opinion in *House v. Mayo, 324 U. S. 42, 45; 89 L. Ed. 739, 742*, it is stated: "Since the petition for habeas corpus was denied without requiring the respondent to answer and without a hearing, *we must assume that the petitioner's allegations are true.*"

To the same effect see *Smith v. O'Grady, 312 U. S. 329, 85 L. Ed. 859*, opinion by Mr. Justice Black.

In *Bridges v. California, 314 U. S. 252, p. 260, 86 L. Ed. 192, p. 201*, we quote the following from the opinion of Mr. Justice Black: "If the inference of conflict raised by the last clause be correct, the issue before us is of the very gravest moment. For free speech and fair trials are two of the most cherished policies of our civilization, and it would be a trying task to choose between them."

In *Dennis v. U. S., 339 U. S. 162, p. 173, 94 L. Ed. 734, p. 743*, Mr. Justice Jackson in a concurring opinion stated the proposition as follows: "I adhere with increasing conviction to my dissent in *Frazier v. United States, supra (335 U. S. at 514, 93 L. Ed. 200, 69 S. Ct. 201)*. The Court there dug a pit dangerous for civil liberties. The right to fair trial is the right that stands guardian over all other rights." In the same case *339 U. S., page 184; 94 L. Ed., page 749*, in a dissenting opinion Mr. Justice Frankfurter said: "It was a wise man who said that there is no greater inequality than the equal treatment of unequals."

## CONCLUSION

Most, if not all the authorities herein cited, are in further support, clarify and amplify issues presented in petitioners' former briefs, and the same is true concerning comment and argument of counsel. This is unavoidable. The points are so closely related to one another that they are governed by the same legal principles, and often supported by the same cases.

Counsel has not intentionally transgressed the rules of this Court, but the restrictions and limitations in Rule 33 pertaining to Petition for a Rehearing of decisions on certiorari, it is extremely difficult to discuss the case and literally comply with the rule.

The petition for writ of certiorari was based squarely on the proposition that Petitioners had been denied the opportunity of a hearing or a fair trial, as the term is used in the Due Process Clause. Their claim was predicated on the further proposition that the undisputed record evidenced their contention because the facts alleged were not denied, and that as respondents failed to answer the facts must be presumed to be true.

A number of the cases above cited are exactly in point and unequivocably hold that petitioner was exactly correct in its interpretation. Some of them have nothing more than the uncorroborated sworn statement of a convict to support them.

It follows that if those cases are right, the petition should have been granted, and it would seem that the discretionary powers of this Court were obviously arbitrarily applied.

Respectfully submitted,

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I, W. T. Saye, of counsel for petitioners in the foregoing brief, hereby certify that a copy hereof has been served on each of the above named counsel for respondents.

This 28th day of March, 1953.